IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1384

CLAY COMMUNICATIONS, INC., *Petitioner*

v.

JAMES M. SPROUSE, *Respondent*

On Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

Petitioner, Clay Communications, Inc., filed in this Court on May 2, 1975, its Petition for Writ of Certiorari to the West Virginia Supreme Court of Appeals. That petition was denied by Order of this Court, dated October 6, 1975. That Order further stated that Mr. Justice Brennan would grant certiorari and that, for

reasons stated, Mr. Justice Douglas would grant certiorari and summarily reverse.

Although this Court's Order denying Clay Communications' petition had the effect of finalizing the substantial judgment against Clay in the amount of $250,000, together with more than $32,500 in interest, it is for a more important reason that this petition for rehearing is filed with the Court.

On August 27, 1975, more than three months after the filing of petitioner's Petition for Writ of Certiorari in this case, the respondent, James M. Sprouse, a Justice of the West Virginia Supreme Court of Appeals, announced his resignation from that court, after serving only two years and eight months of his twelve-year term, and announced his candidacy for the office of Governor of the state of West Virginia. (*See* App. A, B, attached to this petition.) This is the same office to which respondent aspired when the alleged offending articles were written. And he has again invited public scrutiny of his net worth and assets. (*See* App. C, D, attached to this petition.) Further, upon being advised of this Court's action in its Order of October 6, 1975, respondent Sprouse again took the opportunity, through his press secretary, to condemn the petitioner's newspaper for having been "put to political use" in 1968. (*See* App. E, attached to this petition.)

This intervening circumstance concerning respondents actions has brought into clear focus the outrageous result of the novel unconstitutional limitations engrafted upon the American press generally, and the press of petitioner and all other media in the state of West Virginia in particular, by the opinion of the court below, the West Virginia Supreme Court of Ap-

peals. These developments make it clear that this case is of sufficient importance to require review by this Court.

The court below prophetically stated that the appeal presented a question of first impression in the United States with regard to the law of libel in light of *New York Times* v. *Sullivan*, 375 U.S. 254 (1964). (Pet. App. A, p. 4a)[1] In essence, the court below stated that this question of first impression was whether or not evidence of a newspaper joining with political partisans in an overall plan or scheme to discredit the character of a political candidate[2] is relevant in determining whether a newspaper acted recklessly and with willful disregard of the truth when it published grossly-exaggerated, defamatory headlines unsupported by the factual recitations in the body of the story. In answer to this question, the court below has now departed from the *New York Times* v. *Sullivan* doctrine, and announced a new doctrine henceforth to be known as the "unreasonable deviation test." Under this new test, the court below stated that a verdict for libel may be sustained if plaintiff can show an unreasonable deviation between headlines and the remainder of the presentation if that plaintiff first shows that the newspaper was engaged in a plan or scheme to injure that plaintiff. (Pet. App. A, p. 5a) No showing of a false

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[1] The complete opinion of the West Virginia Supreme Court of Appeals is set out in petitioner's Petition for Writ of Certiorari as Appendix A, pages 1a through 54a. All references to pages of that opinion will be cited to that appendix.

[2] It should be noted that this Court, in *New York Times* v. *Sullivan*, at 375 U.S. 273, stated that "Criticism of their [public officials] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."

and defamatory statement of fact is required under this new "test."

The opinion of the court below in fact decided that a newspaper must be an impartial reporter of facts; that when a newspaper decides to support a candidate for public office it immediately subjects itself to the charge of conspiracy to injure the opposition candidate; and that political reporting and, indeed, editorializing of factual matters casting unfavorable light upon the candidate opposed, is evidence of *Sullivan* malice. There was not a scintilla of evidence in the trial-court record to demonstrate anything other than an industrious and good-faith investigation of matters brought to petitioner's attention by officials of respondent Sprouse's opposition in the gubernatorial election.

Stripped of this clearly-erroneous conspiracy theory, which requires the press of West Virginia to be an impartial reporter of facts, the opinion of the court below upholds the libel verdict against petitioner on grounds that clearly violate the doctrine laid down by this Court in *New York Times* v. *Sullivan, supra.* The court below arbitrarily and without foundation in the record concluded that certain of the headlines in evidence were overly large in size and did not accurately reflect the information conveyed in the articles following those headlines. This deviation between headlines, concededly not defamatory *per se*, (Pet. App. A, p. 7a) and articles, concededly containing substantially truthful, factual information (Pet. App. A, pp. 10a, 11a) was in fact the basis upon which the court below upheld the jury verdict against the petitioner.

By way of analogy it is well established in the law of intentional torts, particularly in the field of the tort of

malicious prosecution, where malice is an element of the offense, that where probable cause is shown in defense to the cause of action such a defense is perfect, notwithstanding the fact that the defendant in instituting and carrying on the action may have been actuated soley by a motive and intent of malice. *Crescent City Live-Stock Landing and Slaughterhouse Co.* v. *Butchers' Union Slaughter-house and Live-Stock Co.*, 120 U.S. 141, 149 (1887); *Stewart* v. *Sonneborn*, 98 U.S. 187, 194 (1878); *Hunter* v. *Beckley Newspapers Corporation*, 129 W.Va. 302, 311, 40 S.E.2d 332, 337 (1946). That principle is particularly pertinent in this case since the articles complained of were concededly factually accurate in material substance, and followed headlines concededly not defamatory *per se*. In order to sustain a libel verdict against a newspaper it is necessary for a public figure plaintiff to prove all of the elements of the cause of action—a false and defamatory statement of fact published with actual malice.[3] Even if, for the sake of argument, the finding of a conspiracy to injure may be considered "actual malice," proof of the other elements is necessary and the existence of malice alone is insufficient. In this case, however, the court below, although acknowledging the lack of proof of the other elements, supplied those missing elements by the presence of malice alone. The court's action was, then, analogous to a court upholding a verdict for malicious prosecution because the prosecution was maliciously brought even though probable cause for the prosecution was established as a matter of law.

Even the court below realized that the articles in question, without resort to the conspiracy to injure

[3] *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Gertz* v. *Welch*, 418 U.S. 323 (1974).

theory, would not sustain the cause of action by a candidate for office when it said:

> "Obviously, in the absence of other evidence demonstrating a plan or scheme to injure, mere lack of reasonableness with regard to the headline being a fair summary of the story, or even gross negligence, would not sustain a cause of action by a candidate for office. *Gertz* v. *Welch*, 418 U.S. 323 (1974)." (Pet. App. A, p. 9a)

Accordingly, it is respectfully submitted that this Court should hear this case and declare that a newspaper may not have a libel verdict rendered against it when its articles are substantially correct factually, notwithstanding the size it selects for headlines, and notwithstanding some literary license in designing headlines for impact even if it is motivated by an intention to ally itself with a candidate for public office for the purpose of defeating or "injuring the candidacy" of the opposition candidate about whom the articles were written.

Because this Court has, by its Order of October 6, 1975, allowed the decision of the court below to stand, the petitioner newspaper now finds itself in the precarious and anomalous position of having already been indicted and convicted as a "conspirator" in opposition to the gubernatorial candidacy of the respondent, yet desirous of exercising its First Amendment right to write articles concerning respondent's candidacy and, indeed, to editorialize upon that candidacy. Under the theories espoused by the court below, any articles or editorials written by the petitioner concerning the respondent and his renewed candidacy for Governor will subject petitioner to a libel verdict if some court should decide, indeed even arbitrarily, that head-

lines are exaggerated in size and do not necessarily reflect the content of factually-truthful articles concerning respondent. In other words, it appears that any articles written by petitioner about the respondent and his candidacy are now presumed to have been generated by "actual malice" and all the court need do is apply the "unreasonable deviation test" articulated by the court below and petitioner is chargeable with actionable libel.

Certainly the petitioner newspaper may wish to explore respondent's candidacy and perhaps even again explore his published financial statement so that the voters may be fully informed on the candidates. However, it is difficult to conceive a situation where the action of a court has had a more unconstitutional, chilling effect upon a newspaper's First Amendment right than the case which has been presented to this Court by the Petition for Writ of Certiorari. In fact, the opinion of the court below not only has such a chilling effect, but in reality operates as a prior restraint upon petitioner's First Amendment right to publish on matters of deep political concern to the people of West Virginia.

The ramifications of the opinion and decision of the West Virginia Supreme Court of Appeals, which this Court has allowed to stand, are so devastating to the rights of the press under the First Amendment to the Constitution that they cannot be permitted to stand. A vital and free press should not and cannot be forced to become a sterile, impartial reporter of facts and remain one of our most cherished protectors of liberty and freedom.

The *Amicus Curiae,* the American Newspaper Publishers Association, has authorized the undersigned

counsel to state that it fully supports the arguments advanced herein and urges the Court to grant the rehearing requested because of the serious impact of the opinion and decision of the court below upon political reporting by the press throughout the United States.

In accordance with Rule 58(2), the undersigned counsel hereby certify that this petition is presented in good faith and not for delay, and that this petition is restricted to grounds specified in that Rule.

CONCLUSION

For the foregoing reasons it is most respectfully urged that this Court reconsider petitioner's Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals and grant that writ as prayed.

Respectfully submitted,

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APPENDIX A

ASSOCIATED PRESS WIRE

August 27, 1975

CHARLESTON, W.Va. AP—Justice James N. Sprouse quit the West Virginia Supreme Court Wednesday and announced his Democratic candidacy for governor, for which he was defeated in a close 1968 race.

His entry points to a probable 1976 Democratic primary race against 1972 nominee John D. Rockefeller IV, with Charleston Mayor John Hutchinson as a possible third major contender. Neither Rockefeller nor Hutchinson has yet announced, however.

Flanked by his wife June and their five children, the 51-year-old Sprouse announced his resignation from the court, effective immediately, and his candidacy for governor at a news conference. It was held in the living room of the Sprouse home here, across the Kanawha River from the governor's mansion.

He leaves the Supreme Court with nine years and four months left of the 12-year term to which he was elected in 1972. Republican Gov. Arch A. Moore Jr. will get to appoint a replacement to serve until someone is elected next year to complete Sprouse's term.

Sprouse said he resigned from the court reluctantly.

"I enjoy the work on the court. I think it is greatly rewarding. I think we have really contributed. At the same time, I see a greater challenge in another direction," he said.

He said West Virginia, partly because of mounting demand for coal produced energy, is entering a period "of the greatest growth we have seen in many years in our state."

It will be a period, Sprouse said, in which the state will need "a leader who knows the state, its problems and its people, a leader in the Democratic tradition."

He put improvement of secondary roads, schools and health facilities on his list of campaign priorities. He said the list will grow as he hears from the public.

"During the first months of the campaign I'm going to be doing a lot of listening to the citizens of West Virginia." Sprouse said.

He announced a campaign schedule for the next 10 days. It includes visits to Huntington, Parkersburg, Wheeling, Clarksburg, Fairmont, Morgantown, Martinsburg, Beckley, Bluefield, Williamson, Logan and Union.

At the news conference, Sprouse distributed copies of a personal financial statement, placing his net worth at $277,400, and of his 1974 federal and state income tax returns.

APPENDIX B

The Charleston Gazette, Wednesday, August 27, 1975

SPROUSE'S CANDIDACY BID EXPECTED TODAY

By Fanny Seiler
Staff Writer

Supreme Court Justice James M. Sprouse is expected to announce his candidacy today for the Democratic gubernatorial nomination in 1976.

Sprouse called a news conference for 10 a.m. at his home in Charleston. Although Sprouse declined to say specifically that he would announce, that was the natural assumption. In addition, knowledgeable sources indicated Sprouse would announce, thereby becoming one of the first candidates to announce his intentions of running in either the Democrat or Republican parties.

"I'm going to answer the speculation of whether I am going to run," Sprouse said.

Reporters from around the state were invited to the news conference, giving more credence to the speculation that Sprouse would seek nomination to the office he lost by 12,785 votes in 1968. That was the closest defeat since 1916 in a gubernatorial race.

Notice of the news conference was given by Charles Ryan Associates which reportedly will handle advertising for Sprouse.

* * *

Sprouse's Entry into the primary with John D. "Jay" Rockefeller IV, who was defeated by the same man as Sprouse, has been looked upon with certainty in political circles since midsummer.

Rockefeller was defeated by Gov. Moore by 73,355 votes in 1972.

Sprouse declined also to discuss Tuesday afternoon whether he had talked with Rockefeller about his plans. Rockefeller was out of town Tuesday.

Sprouse has been reluctant to say anything publicly about the possibility of his entering a political campaign as long as he's a member of the State Supreme Court. Sprouse said earlier he doesn't want to embarrass the court, and if he ran he would resign. He was elected to the Supreme Court to a 12-year term in 1972.

Chief Justice Charles Haden II said he hadn't received any notice from Sprouse Tuesday although Sprouse was in his office in the court during the morning. The court is in recess until next Wednesday.

Sprouse, 51, long has been active in the Democratic party. He was campaign chairman for Hulett Smith when Smith ran unsuccessfully for governor in 1960, and chairman again when Smith was elected governor in 1964.

Sprouse served as state Democratic chairman from January, 1965 until 1968 when he resigned to run for governor himself in the primary in 1968. Sprouse beat four other candidates. Sprouse got 123,181 votes compared with 118,637 for C. Donald Robertson, then the attorney general; 72,917 for Paul J. Kaufman, 8,524 for William A. Lawson of Fairmont, and 4,164 for Blair F. Winans of Weston.

Sprouse was born Dec. 3, 1923, in Williamson. He is a graduate of St. Bonaventure College and Columbia Law School. He studied international law one year at the University of Paris and University of Bordeaux, France.

Sprouse is a former lawyer for the West Virginia Labor Federation, AFL-CIO. The federation backed him in 1968, as it supported Rockefeller in 1972. There has been early speculation that Sprouse would receive labor support from both the federation and the United Mine Workers union.

APPENDIX C

ASSOCIATED PRESS WIRE

August 27, 1975

CHARLESTON, W.Va. AP—Democratic gubernatorial candidate James Sprouse says he is worth $277,400.

Sprouse distributed his personal financial statements and his 1974 federal and state income tax returns Wednesday when he announced his candidacy and his resignation from the state Supreme Court.

Total assets listed in the financial statement were $430,900. The largest item was $342,000 in real estate, including a house and farm in Monroe County, his Charleston home, six Dunbar lots and one in Summersville. Fifty head of cattle were listed at $15,000.

Assets also included $30,000 in securities, consisting solely of 2,000 shares of stock in Lejuda Development Corp. Sprouse said he and four others are stockholders in the corporation, which owns only a 287-acre Greenbrier County farm with a $140,000 mortgage and a $325,000 selling price.

Liabilities totaling $151,000 were also listed. Of that, $130,000 went for mortgages on personally owned real estate.

According to the federal income tax return, Sprouse's 1974 gross income was $34,713, of which $32,500 was his Supreme Court salary. After deductions of $14,311 and exemptions of $6,000 for himself, his wife, their five children and his mother, he paid $2,861 in federal tax on taxable income of $14,402.

APPENDIX D

The Charleston Gazette, Thursday, August 28, 1975

SPROUSE BEGINS CAMPAIGN WITH FINANCIAL DISCLOSURE

By Fanny Seiler, *Staff Writer*

James M. Sprouse launched his campaign for the Democratic gubernatorial nomination Wednesday by making a financial disclosure of his assets and liabilities and then starting visits to the state's major cities.

Sprouse first announced that he had resigned from the State Supreme Court effective Wednesday, and then declared his candidacy at a news conference at his home in Charleston. He was surrounded by his wife, June, and their five children.

"This is the time in the history of West Virginia when a leader is needed who knows the state, its people, their problems and their needs," Sprouse said. He listed better secondary roads, better schools and better health care facilities as goals and said others would be outlined as the campaign progressed.

In addition to his close ties with West Virginia, Sprouse hit on another theme which he apparently will be using in his political fight with John D. "Jay" Rockefeller IV—the need for a leader who can win in the fall of 1976 with a resounding victory.

* * *

Sprouse, in response to a question, said he hoped there wouldn't be a bitter fight between him and Rockefeller, who lost in 1972. Sprouse was narrowly defeated in 1968. Both men lost to Gov. Moore.

"I plan to conduct a campaign on a high level," Sprouse said.

Rockefeller, meanwhile, said the announcement didn't come as a surprise. "That's been fairly clear for quite a

while." But he said, Sprouse's entry into the race wouldn't affect his plans, and he would continue to make personal contacts in each of the counties. Since leaving Wesleyan College 1½ months ago, Rockefeller said he got "very excellent" support. His announcement, he said "won't be pretty quickly," but will be made when he feels the time is appropriate. When asked if there was a chance he wouldn't run, Rockefeller said, that was "pretty minimal."

Sprouse's financial statement showed assets of $430,900, liabilities of $151,500, and a net worth of $277,400. He had $130,000 in real estate mortgages, $90,000 on his farm at Union, and $40,000 on his home in Charleston. The real estate was valued at $342,000, plus $21,000 in machinery, furniture and fixtures with the exception of two automobiles worth $5,000. Fifty cattle and calves were valued at $15,000.

He listed $1,400 in cash on hand and in banks along with $13,500 in notes owed to him, plus $30,000 in stock in Lejuda Development Corp., which owns a 287 acre farm in Greenbrier County. That property has a $140,000 mortgage and is for sale for $325,000. Other stockholders are the Miles Stanley estate, Maurice Fancher estate, Everette Sullivan, and Lawrence Barker, secretary-treasurer of the West Virginia Labor Federation, AFL-CIO. All original stockholders were former clients in the labor movement, the statement said.

Sprouse also released copies of the 1974 federal income tax return which showed adjusted gross income of $34,713 —$32,500 from the Supreme Court—and taxable income of $14,402. He had $6,000 in exemptions, and $14,311 in deductions, primarily mortgages and taxes. Sprouse paid $6,074 in personal income taxes to the federal government.

* * *

Sprouse said his resignation from the Supreme Court to which he was elected to a 12-year term in 1972 was mailed Wednesday to Gov. Moore. He said he found the work on

the court rewarding and was proud of his association, as well as the court's record. "At the same time, I see a greater challenge in another direction," Sprouse said in announcing his candidacy.

The candidate predicted greater growth in the state's economy and culture. Part of the economic growth, he said, would come from the role the state will play in the energy picture because of its abundance of coal. But he said, "We can look forward to development of diversity" with permanent plants and permanent jobs.

Commenting for the first time publicly on the chances that Gov. Moore can seek a third term in office, Sprouse said, he didn't think Moore could. "I know that language," he said, in the constitutional amendment which permits a governor to succeed himself. Sprouse said there wasn't any more clear language.

Sprouse also said he couldn't believe that any one who Moore might name to the court would enter into a deal to vote to allow the Governor to run for a third term. "Judges decide questions on the law," he said, "not on the basis of politics."

Sprouse said he would announce later who his campaign chairman will be. Reliable sources had indicated it will be Kanawha County Commission President Jack Catalano.

Sprouse's agenda through Sept. 6 includes visits to Huntington Wednesday night and today; Parkersburg tonight through Friday morning; Wheeling Friday morning until Sunday, Charleston for a news conference the Tuesday after Labor Day and then to Clarksburg until the morning of Sept. 3; Fairmont and Morgantown Sept. 3; leave Morgantown Sept. 4 for Martinsburg, leave for Beckley late Sept. 4 for an overnight stay and fly to Bluefield prior to noon Sept. 5; fly to Williamson, Logan and Union the same day, and be in Union for an all day picnic Sept. 6.

APPENDIX E

SPROUSE PRESS RELEASE

October 6, 1975

From Jerry Kessel

Press Secretary to James Sprouse

The following statement was issued today (Monday) by James Sprouse upon learning of the U.S. Supreme Court's ruling in his case against the Charleston Daily Mail:

"I have just received the news that the United States Supreme Court upheld the verdict in my suit against the Charleston Daily Mail. This, to me, is a vindication for a great personal injury inflicted purposely and maliciously.

"It is not an indictment against newspapers generally. Rather, it is a reinforcement of the constitutional freedom of the press in news media generally in West Virginia which has always exercised a great sense of fairness in political campaigns and it is only the few who turn their news organs into political propaganda that abuse the rights of the other media and reflect discredit on that whole profession.

"This was the case in 1968 when an otherwise very fine newspaper was put to political use, in complete disregard of the human rights of an individual. I hope the Supreme Court's action today sets this in proper perspective."